of the Rent Control Ordinance, 1948 for permission to the institution of the present suit and, having omitted to do so, the High Court was without jurisdiction. This point has been raised for the first time before us. The case proceeded in the Court below on the basis that the two points for decision were :—

(a) was the agreement extended? and

(b) did the plaintiff tender to the defendant the $1,000 due under clause 7 of the agreement?

I can see no reason for disagreeing with the learned trial judge as to his findings on these two issues.

Mr. Wrigglesworth agreed that to succeed on his main ground of appeal it was necessary for him to satisfy this Court that the agreement annexed to the plaint must be capable of being construed as a landlord and tenant agreement without reference to the evidence which was recorded in the High Court. He has submitted that exclusive possession of the coffee-eating-house business premises flowed irresistably from the letting of the business and that there could not be a letting of the business without a letting of the premises. The agreement refers throughout to the letting of the business, and clause 3 deals with rent as follows :—

"The said renter shall on the first day of each and every month during the continuance of this agreement without fail pay to the vendor the said rent of $150 (dollars one hundred & fifty only) for the use of the furniture and fittings as enumerated herein below and for the conduct of the said business."

Clause 4 allows the appellant to collect the rent from the upstairs sub-tenants of the respondent and to enjoy them for himself. In my view, it is unnecessary to decide this point one way or the other, and I will content myself with saying that it is doubtful whether the agreement can be construed in the sense that the appellant would have it.

The decisive point in this appeal is whether the appellant is entitled to benefit from the jurisdiction issue. I think the answer is to be found in *Farquharson v. Morgan*[1]. The first part of the head-note reads :—

"Where total absence of jurisdiction appears on the face of the proceedings in an inferior Court, the Court is bound to issue a prohibition, although the applicant for the writ has consented to or acquiesced in the exercise of jurisdiction by the inferior Court."

A clear distinction is drawn in this case between patent and latent defects in jurisdiction. Lopes L.J. says (at p. 559) :—

"The result of the authorities appears to me to be this: that the granting of a prohibition is not an absolute right in every case where an inferior tribunal exceeds its jurisdiction, and that, where the absence or excess of jurisdiction is not apparent on the face of the proceedings, it is discretionary with the Court to decide whether the party applying has not by laches or misconduct lost his right to the writ to which, under other circumstances, he would be entitled."

In Davey L.J.'s judgment, he quotes from Lord Mansfield's judgment in *Buggin v. Bennet*[2], the following passage (p. 562) :—

"If it appears on the face of the proceedings that the Court below have no jurisdiction, a prohibition may be issued at any time, either before or after sentence; because all is a nullity; it is *coram non judice*. But where it does not appear on the face of the proceedings, if the defendant will lie by and suffer that Court to go on under an apparent jurisdiction, as upon a contract made at sea" (he was dealing with an Admiralty case), "it would be unreasonable that this party who, when defendant below, has thus lain by and concealed from the Court below a collateral matter, should come hither after sentence against him there and suggest that collateral matter as a cause of prohibition and obtain a prohibition upon it after all this acquiescence in the jurisdiction of the Court below."

The learned Lord Justice continues :—

"The reason of the distinction between cases in which the excess of jurisdiction appears on the face of the proceedings, and where it does not so appear, is explained by Coleridge J. in Marsden v. Wardle (3 E & B 695 at p. 701). 'There is reason' says the learned Judge 'for refusing the writ after judgment in the Courts where the proceedings set forth the detail of the matter, and the party has the opportunity of moving before judgment. Then if he chooses to wait and take the chance of judgment in his favour, he may be held incompetent to complain of excess of jurisdiction if judgment is against him. There is, however, good reason for departing from this principle where the defect is apparent on the face of the proceedings below; because the complaint in that case does not rest on the evidence of the complainant; and, if such a defective record were allowed to remain and to support a judgment, it might become a precedent: that which was in truth an excess of jurisdiction might be considered to have been held to be legal'."

In this case the defect in jurisdiction is not patent on the face of the proceedings, and I would require far more extended argument than we enjoyed before I were satisfied that in fact there was any defect in jurisdiction.

I would dismiss the appeal with costs and order the deposit to be paid to the respondent's solicitor.

Appeal dismissed.

Solicitors : *S. M. Yong & Co.; A. K. Sen.*

YUSOFF & ANOR. v. PUBLIC PROSECUTOR

[C. A. (Mathew C.J., Wilson and Buhagiar JJ.) October 21, 1955]

[K. L. — F.M. Criminal Appeal No. 38 of 1955]

Evidence Ordinance, 1950, s. 30 — Confession of one accused — Whether sufficient to establish guilt of a co-accused and himself — Issues of fact relevant to the charge.

Criminal Procedure Code (Cap. 6), s. 198 — Judgment on points of law.

This was an appeal against the conviction of the appellants for the murder of an unknown Malay woman. The prosecution case depended almost entirely on a confession made by the 2nd appellant to a Magistrate. That confession laid the entire blame for the killing on the 1st appellant. When brought before the Magistrate the 2nd appellant told the Magistrate that he decided

to tell the truth as his wife would be kept in trouble by his being detained. The statement in the confession as to the manner in which the deceased met her death was not supported by the medical evidence.

Held: (1) as there was a suggestion that there was a motive other than the desire to tell the whole truth in the mind of the 2nd appellant when he made his confession and as it appeared that certain statements in the confession could not be true it was necessary for the trial Judge to examine the question whether the confession was voluntary and whether its contents bore the stamp of truth; (2) even accepting the confession of the 2nd appellant as being both voluntary and true, such a confession alone was insufficient upon which to base the conviction of the 1st appellant.

Semble: It is desirable in all cases where there is a trial by a Judge with assessors that a judgment dealing with the points of law should be delivered.

CRIMINAL APPEAL.

Eugene Lye for the appellants.

Mahmud Mohd. Hashim (Federal Counsel) for the respondent.

Mathew C.J. (delivering the judgment of the Court): — The appellants were convicted of the murder of an unknown Malay woman and were sentenced to death. The prosecution depended almost entirely on an extra-judicial confession of the 2nd appellant made to a Magistrate. The confession laid the entire blame for the killing on the 1st appellant. If the confession is true, it is an attempt on the part of the 2nd appellant to show that he acted under duress and was in fear of his life if he did not comply with the wishes of the 1st appellant.

Apart from the confession, the only evidence that can connect the appellants with the death of the woman is the evidence of P.W. 5 and P.W. 8, who say that they saw the two appellants at about midnight in the early morning of the 20th September, 1954 at a place somewhere near where the death took place. One of the witnesses (P.W. 8) failed to identify the 2nd appellant at the identification parade.

The body was found about 10 a.m. by one Abdul Rahman bin Ahmad (P.W. 4). At 1.15 p.m. the Medical Officer was taken to view the body at the site of the death, and at 3 p.m. he prepared a post mortem examination. He expressed the opinion that death may have occurred between midnight and 10 a.m. the next day and withdrew his statement which he made to the police constable that death probably occurred at 8 a.m. He could not definitely exclude the possibility of suicide. It would further appear that death was not caused by throttling, as suggested in the confession of the 2nd appellant.

The confession to the Magistrate was made on 30th September 1955 by the 2nd appellant, who had been arrested on 27th September, though on this point the prosecution witnesses were confused. In the memorandum of enquiry which preceded the recording of the said confession the following passage occurs:—

"He says that a number of police whom he did not recognise were in charge of him at the police station in rotation. He says that while in police custody he was interrogated by the police but that he did not tell the truth as he had been threatened by one Jusoh not to disclose the matter. He says that at about 1 p.m. yesterday (29.9.54) he decided to tell the truth as he thought his wife would be kept in trouble by his being detained. So yesterday he informed Mr. Lloyd that he was going to tell all the true facts about the murder of the woman at Merbau."

There is in this passage a suggestion that there was a motive other than a desire to tell the whole truth in the mind of the 2nd appellant when he made his confession. It was therefore particularly necessary for the learned trial judge to examine the question as to whether the confession was voluntary and also to consider the terms of the confession to see if the contents bore the stamp of truth.

The 2nd appellant alleged that the deceased died as a result of being throttled. The medical evidence does not support this theory. A careful examination of the confession was very necessary as, if it appeared that certain statements contained therein could not be true, it threw doubt both on the voluntary nature of the confession and the value of the confession as evidence of the whole truth. It is also a matter for consideration that the 2nd appellant threw the whole blame on the 1st appellant and put up a defence of duress which if believed might have exculpated him. The question of duress was never considered and, in fact, part of the confession was used for convicting the 1st appellant and another part rejected for the purpose of convicting the 2nd appellant. We consider that a conviction based on a confession such as this cannot stand.

Quite apart from this, even accepting the confession of the 2nd appellant as being both voluntary and true, there is the question whether the confession was sufficient to establish the guilt of the 1st appellant. Section 30 of the Evidence Ordinance reads:—

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court *may take into consideration* such confession as against such other person as well as against the person who makes such confession." (The underlining is ours).

The effect of the words "may take into consideration" is well set out in *Woodroffe & Ameer Ali's* Law of Evidence, 9th edition, at pp. 312 & 313, as follows:—

"These words do not mean that the confession is to have the force of sworn evidence, but such a confession is nevertheless evidence in the sense that it is matter which the Court, before whom it is made, may take into consideration in order to determine whether the issue of guilt is proved or not. The wording, however, of this section (which is an exception) shows that such a confession is merely to be an element in the consideration of

all the facts of the case; while allowing it to be so considered, it does not do away with the necessity of other evidence."

The other evidence is of little, if of any, value and merely shows that the two appellants were seen together about midnight on the 19th/20th September 1955. In fact, the convictions rest entirely on the confession of the 2nd appellant which we have already pointed out is wrong.

There is a further matter which should be mentioned. The second issue of fact put to the assessors was :—

"If your answer to question 1 be in the affirmative, do you consider that confession to be sufficient to find No. 1 guilty of the charge?"

This question should not have been put to the assessors, as it was a point of law for the learned trial judge to determine. At the highest, an expression of opinion on such a matter by an assessor would be of little value. The learned trial judge having recorded the opinions of the assessors convicted both the appellants.

We can only assume, as there was no reasoned judgment that the learned trial judge considered that the confession of the 2nd appellant was a sufficient basis on which to found the conviction of both accused. We would point out that in the absence of a reasoned judgment, the judges of the Court of Appeal are placed in a difficulty, for they do not know the precise reasons which have caused the learned judge to convict, and only if a consideration of the whole case convinces them that no other decision was possible can they dismiss the appeal.

Under section 198 of the Criminal Procedure Code it is the trial judge who is dominus, and he can accept or reject the opinion of the assessors on such issues of fact relevant to the charges as have been put to them. It is from the trial judge's judgment that the appeal lies. It is, there, desirable that in all cases a judgment dealing with the points of law should be delivered. In some cases only a brief judgment may be necessary, but in our view there should always be a reasoned judgment.

For these reasons we allowed the appeal and quashed the convictions.

Appeal allowed.

ANNAMALAI CHETTIAR v YEOH KEE TIN (m.w.)

[A. C. J. (Buhagiar J.) October 21, 1955]

[K. L. — F.M. Civil Appeal No. 45 of 1955]

Courts Ordinance, 1948, ss. 17, 18 & 42 — Application for stay of execution — Co-ordinate jurisdiction.

This was a motion preferred to the Court of Appeal for stay of execution of the order of the High Court until the final disposal of the appeal. At the hearing of the application counsel for the respondent raised a point by way of preliminary objection that the Court of Appeal had no jurisdiction to entertain the application by reason of the provisions of ss. 42 and 17 of the Courts Ordinance 1948. It appeared that a similar application had been made to the learned trial Judge but such application had been withdrawn.

Held: while the Court of Appeal has co-ordinate jurisdiction with the Court below, the Court of Appeal will not exercise its jurisdiction until a similar application has been made to and refused by the High Court.

Case referred to :—

(1) *Cropper v. Smith* (1883), 24 Ch. D. 305.

MOTION in Civil Appeal.

D. G. Ironside for the appellant-applicant.

Ng Ek Teong for the respondent.

Buhagiar J. : — The appellant-applicant gave notice of motion before the Court of Appeal for an order that execution of the order dated the 16th day of May 1955, in Kuala Lumpur Supreme Court Civil Suit No. 47 of 1955 be stayed on such terms ns this Court shall deem fit till the final disposal of the appeal in the above matter; the application came before me under the provisions of section 18(1) of the Courts Ordinance, 1948.

At the hearing of this application counsel for the respondent raised a point by way of preliminary objection that this Court had no jurisdiction to entertain the application by reason of the provisions of sections 42 and 17 of the Courts Ordinance, 1948.

Counsel for the parties informed me that a similar application had been made to the learned trial Judge but such application was withdrawn and no order was made except as to costs.

Counsel for the applicant relied on section 536 of the Civil Procedure Code (F.M.S. Cap. 7). It is clear from section 529 of the said Code that the provisions of section 536 do not apply to procedure on